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IN THE

Supreme Court of the United States

October Term, 1982

DONALD A. ALESSI and JOHN P. BARTOLOMEI,
Petitioners,

v.

COMMITTEE ON PROFESSIONAL STANDARDS,
THIRD JUDICIAL DEPARTMENT,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK

RESPONDENT'S BRIEF IN OPPOSITION

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Preliminary Statement.

Respondent's brief is submitted in opposition to the petition for a writ of certiorari, which is based on a decision of the New York Court of Appeals, entered on November 18, 1982. *Matter of Alessi and Bartolomei,* ____ N. Y. 2d ____. This decision sustained an order of

the Appellate Division of the New York State Supreme Court, Third Judicial Department, which found that petitioner had improperly solicited clients via direct mail. *Matter of Alessi, Bartolomei, Pedicone and Zablotny,* 88 A. D. 2d 1089 (3rd Dept. 1982).

Statement of the Case.

The petitioners Donald A. Alessi and John P. Bartolomei were the only New York attorneys who were partners in "The Legal Clinic of Cawley and Schmidt" (hereafter referred to as Clinic). The Clinic maintained offices for the practice of law in Buffalo, Rochester, Syracuse and Albany, New York, the latter being the only office of said Clinic in the Appellate Division, Third Department, State of New York.

During August and September, 1979, Linda A. Zablotny, a respondent in the disciplinary proceeding before the Appellate Division, Third Department, authored the letter involved in this matter and submitted it to both Alessi and Bartolomei who reviewed it, edited it and approved it for a bulk mailing from each of their four offices in the State of New York. Approximately one thousand letters were mailed to realtors from each of their four offices. The letter from their Albany office was signed by or on behalf of Henry Pedicone, Jr., Esq., the Clinic's attorney in Albany, by or with his consent and knowledge.

The respondent herein served a verified petition of charges with specifications and notice upon the petitioners herein and attorneys Pedicone and Zablotny.

By notice of motion dated June 3, 1981, and the affidavit of Richard G. Collins, Esq., attorney for the four

respondents in the disciplinary proceeding, sworn to June 29, 1981, a motion was made to dismiss the petition of charges. July 1, 1981, the Appellate Division, Third Department, adjourned the motion pending determination of the appeal in *Matter of Greene* by the Court of Appeals since the factual situation in both matters was basically identical. *Matter of Greene,* 54 N. Y. 2d 118 (1981), was decided October 29, 1981, and sustained an order of the Appellate Division, Second Judicial Department, finding Greene had improperly solicited clients via direct mail (cert. denied ____ U. S. ____, 72 L. Ed. 2d 153 [1982]).

January 15, 1982, the Appellate Division, Third Department, denied respondents' motion to dismiss the petition allowing the respondents to file and serve an answer within 20 days after service of a copy of the order to be entered thereon. Said order was entered January 15, 1982. The respondents made a motion for a stay to file and serve an answer until 20 days from the date of the determination by the United States Supreme Court of the petition for a writ of certiorari in *Matter of Greene.* Such stay was granted March 18, 1982. Certiorari was denied by this Court March 23, 1982, and respondents, through their attorney, submitted a verified answer dated April 9, 1982.

Respondents' answer in the disciplinary proceeding stated,

> "9. Since the conduct with which respondents are charged in the petition is *malum prohibitum* rather than *malum in se,* justice would be served by dismissal of the petition herein based upon this defense.

> "10. If the petition is not dismissed, justice would be served by this Court taking no disciplinary action against respondents based upon this defense."

By notice of motion dated May 14, 1982, returnable May 24, 1982, the respondents in the disciplinary matter moved for a reference for the taking of facts or "allowing the respondents to make further appearances in the proceeding to speak to the issue of possible sanctions if a reference were to be denied and for such other and further relief as (*sic*) may be just proper and equitable." The Appellate Division, Third Department, in a decision of June 22, 1982, determined a reference was unnecessary and found respondents guilty of misconduct "in permitting or approving the mailing of letters to realtors as alleged in the petition. However, since the letters were apparently sent in good faith and in reliance on *Bates v. State Bar of Arizona* (433 U. S. 350) and prior to the decision of the Second Department in *Greene* we determine that no sanction should be imposed for such misconduct." An order to that effect was dated and entered August 3, 1982.

Alessi and Bartolomei thereafter appealed to the New York Court of Appeals which on November 18, 1982, ordered "That the appeal be and the same hereby is dismissed without cost, by the Court *sua sponte* upon the ground that no substantial constitutional question is directly involved."

ARGUMENT.

I. Except for the proscription contained in the decision in *Bates*, this Court has left to the State Courts the right to regulate the use of direct mail by attorneys.

As is now widely recognized by the legal profession, the complete prohibition and ban on attorney advertising was modified by the decision of this Court in *Bates v. State Bar of Arizona*, 433 U. S. 350, 97 S. Ct. 2691, 53 L. Ed. 2d 810, 1977. However, less recognized almost to the point of being ignored was the clear statement by this Court in *Bates* that its decision nevertheless was a narrow one. The Court emphasized that advertising by attorneys still could be regulated. *Matter of R— M. J—*, 455 U. S. 191, 102 S. Ct. 929, at 935, 946 and n. 11 (1982).

Further, this Court has defined its position relative to decisions restricting commercial speech noting "when dealing with restrictions on commercial speech we frame our decision narrowly, allowing modes of regulations [of commercial speech] that might be impermissible in the realm of non-commercial expression." *Ohralik v. Ohio State Bar Ass'n*, 436 U. S. 447, 456, 98 S. Ct. 1912, 1918, 56 L. Ed. 2d 444 (1978).

> "When the particular content or method of the advertising suggests that it is inherently misleading or when experience has proven that in fact such advertising is subject to abuse, states may impose appropriate restrictions." *Matter of R— M. J—, supra*, at 937.

Subsequent to the *Bates* decision, the Court of Appeals, State of New York, decided on October 21, 1980, in an instance where an attorney had mailed two announcements, one to members of the general public and one to real estate brokers announcing availability and charges to handle real estate closings, the letter to the general public was permissible under *Bates* but specifically underlined that as to the letter to the real estate brokers the record before the Court was not adequate to render a decision (*Koffler v. Joint Bar Association,* 51 N. Y. 2d 140, cert. denied 450 U. S. 1026 [1981]). A fair inference to be drawn from the opinion was, in a similar case on a complete record, the Court would not condone such letter (*supra,* at pp. 144, 145, n. 2).

Thereafter, the Court of Appeals considered the propriety of an attorney mailing a letter to brokers announcing his availability to handle real estate matters and stating his fee. This time the Court of Appeals specifically found such mailing should be barred to prevent harm to the general public before such harm occurred because of the obvious element of the attorney's conflict of interest in representing a client solicited by the broker (*Greene v. Grievance Committee,* 54 N. Y. 2d 118, cert. denied ____ U. S. ____, 72 L. Ed. 2d 153 [1982]).

The *Greene* Court spoke to this conflict of interest at page 128 stating:

> "Nor as *Ohralik* makes clear" (and *Primus* confirms [436 U. S. at p. 434]) "is it required that there be 'actual proved harm to the * * * individual' " (436 U. S. at p. 464). "[T]he absence of explicit proof or findings of harm or injury is immaterial" (*id.* at p. 468); "The potential for overreaching

> * * * inherent in * * * in-person solicitation (*id.*) is enough to justify such a regulation."

The Court also noted at page 127:

> "There is, however, a substantial governmental interest in preventing conflicts of interest in attorney-client relationships which the statute directly protects and for which there is no adequately protective less restrictive alternative. The Supreme Court has many times recognized as a proper and substantial governmental interest the prevention of conflicts of interest. (*Matter of Primus,* 436 U. S. 412, 436 ['Serious likelihood of conflict of interest']; *Ohralik v. Ohio State Bar Ass'n,* 436 U. S. 447, 461, n. 19, *supra* ['we cannot say that the pecuniary motivation of the lawyer who solicits a particular representation does not create special problems of conflict of interest.'] and see *id.* at p. 464, n. 22; *N.A.A.C.P. v. Button,* 371 U. S. 416, 443 ['serious danger * * * of professionally reprehensible conflicts of interests which rules against solicitation frequently seek to prevent']).''

The pre-filing of such letters from attorneys to brokers would not overcome the conflict of interest problem inherent in the in-person solicitation of clients by brokers on behalf of the attorney.

The factual situation here is no different than that presented to the Court of Appeals in *Greene. Greene* assured the realtor he would save his client time and money. Petitioners' letter strikes the same tone beginning by stating "we recognize that the costs attendant to the sale or purchase of a home are a real concern to your clients that may

indeed influence whether the transaction will even take place." Who, if not the broker, is most interested in having prospective buyers and sellers in the hands of counsel who can "indeed influence whether the transaction will even take place"?

There is a latent danger in any third party coming between an attorney and a client whether this is a product of personal contact or by mail. While a mailing may be considered by some as less offensive than the personal contact, even the letter, as in this instance, directed to the brokers in such manner as to stimulate desire to foster commissions will also put these brokers in a position to overreach.

Although petitioners lean heavily on the 1979 Michigan decision in *Matter of State Bar Grievance Administration v. Jacques,* 407 Mich. 26, 281 N. W. 2d 469, the attention of the Court is directed to the dissenting opinion of Chief Justice Coleman who wrote:

> "The potential for overreaching or undue influence is substantial when the intermediary solicits the potential client in person. The intermediary may also be a professional, such as a sales person, trained in the art of persuasion." 281 N. W. 2d 476, 477.

The use of an intermediary who is not an attorney to solicit potential clients may also present other risks. The non-lawyer intermediary may be more likely to misstate the applicable law or the client's legal remedies, either through inadvertence, ignorance or on purpose, in attempting to persuade the client to employ a specific attorney. The intermediary may even attempt more extreme

and less ethical conduct than an attorney might use in soliciting clients because a non-lawyer intermediary might not feel bound to adhere to the standards incorporated in the Code of Professional Responsibility.

The use of personal intermediaries to recommend employment also would significantly increase the likelihood that the privacy of potential clients would be invaded. Allowing the use of intermediaries would increase the number of potential clients with whom an attorney could communicate. Moreover once certain attorneys employed intermediaries others might feel compelled to respond by using intermediaries. The privacy of all individuals would be likely to suffer as a result.

Finally, the potential for all these harms increases where the intermediary has or perceives he might have a personal interest in successfully soliciting clients.

Such in-person solicitation, like in-person solicitation by attorneys, "May exert pressure and often demand an immediate response, without providing an opportunity for comparison or reflection." *Ohralik, supra.* It is the presence of these factors which distinguishes this conduct from the advertising in *Bates, supra,* which simply approves access to "information and leaves the recipient free to act upon it or not." *Ohralik, supra,* 457.

Since the *Bates* decision State Courts, other than New York, have exercised jurisdiction concerning cases in which the issue of advertising and free speech have been before them.

Again, noting the *Matter of R— M. J—,* n. 12, page 936, "we foresee no obstacle to states dealing effectively

with this problem. The First Amendment as we construe it today, does not prohibit the state from insuring that the stream of commercial information flows cleanly as well as freely." In the same case, at 937, the Court stated: "thus the Court has made clear in *Bates* and subsequent Court cases that regulation—and imposition of discipline—are permissible where the particular advertising is inherently likely to deceive * * *"

Finally, in the same case somewhat similar to the Court of Appeals in *Koffler, supra,* the Court strongly implies on a proper record it well could sustain a disciplinary proceeding holding it would be deceptive for an attorney to emphasize in advertising he was licensed to practice before this Court. "Indeed such a statement could be misleading to the general public unfamiliar with the requirements for admission to the Bar." *Matter of R— M. J—, supra,* 939.

This Court has held the State of Texas could prohibit the use of trade names by optometrists (*Friedman v. Rogers,* 440 U. S. 1, 99 S. Ct. 987, 59 L. Ed. 2d 100 [1979]).

The Supreme Court of Kansas has held it improper for an attorney to utilize direct mail solicitation of a stranger for employment for a particular matter and made said attorney subject to discipline. *State of Kansas v. Moses,* 231 Kan. 243.

The Supreme Court of Arkansas has held it improper for an attorney to disseminate an advertisement listing a $10 initial consultation fee and a broad range of areas of law as the advertisement did not submit sufficient information to allow one in need of legal services to make an informed selection and additionally since it was disseminated in a packet with other advertisements all but three of

which were coupons for discounts the impression was created the attorney's offer was also a discounted fee. *Eaton v. Supreme Court of Arkansas,* 607 S. W. 2d 55 (1980).

The *Ohralik* case, 436 U. S. 447, 56 L. Ed. 2d 444, 98 S. Ct. 1912, made two statements which are of peculiar applicability herein. First, at page 459, it stated: "A lawyer's procurement of remunerative employment is a subject only marginally effected with First Amendment concerns. It falls within the state's proper sphere of economic and professional regulation."

The Court then went on to say: "The rules prohibiting solicitation are prophylactic measures whose objective is prevention of harm before it occurs." This is at page 464.

CONCLUSION.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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